**IN THE**
**MISSOURI SUPREME COURT**

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| **STATE OF MISSOURI,** | **)** | |
| | **)** | |
| **Respondent,** | **)** | |
| | **)** | |
| **vs.** | **)** | **No. SC 87840** |
| | **)** | |
| **JOHN BURGIN,** | **)** | |
| | **)** | |
| **Appellant.** | **)** | |

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**APPEAL TO THE MISSOURI SUPREME COURT**
**FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI**
**TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 20**
**THE HONORABLE COLLEEN DOLAN, JUDGE**

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# SUBSTITUTE APPELLANT'S REPLY BRIEF

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## JURISDICTIONAL STATEMENT

Appellant, John Burgin, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

## STATEMENT OF FACTS

Mr. Burgin incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

## ARGUMENT

### I.

**None of the State's reasons for asking this Court to overrule *Beine* or declare its holding to be *dicta* has merit: 1) the *Beine* decision was not *dicta* but addressed the primary issue in the case; 2) there is no issue presented here of the failure to preserve a constitutional challenge, because Mr. Burgin has not made one; and 3) the rationale of *Beine* for declaring § 566.083.1(1) unconstitutional is still sound.**

The State takes a three-part approach to affirming Mr. Burgin's conviction despite this Court's opinion in ***State v. Beine***, 162 S.W.3d 483 (Mo. banc 2005), declaring the statute under which he was convicted unconstitutional: 1) the Court's constitutional holding in ***Beine*** was not a holding but "Non-binding *Dicta*" (Resp.Br. 10-15); 2) Mr. Burgin has not presented a preserved challenge to the constitutionality of § 566.083.1(1), RSMo 2000 (Resp.Br. 16-17); and 3) the statute (now repealed) is not unconstitutional on its face or as applied to Mr. Burgin (Resp.Br. 17-26).

Mr. Burgin grants that he did not challenge the statute at trial, or, for that matter, in the Court of Appeals. That fact, however, is of little relevance to the issues before this Court, primarily because that is a question the Court has already disposed of. ***Beine*** left no doubt as to the statute's invalidity, and the State has offered no persuasive reason for the Court to revisit that issue.

## A. This Court's holding in *Beine* was not *dicta*

The State's claim that ***Beine's*** essential holding was nonbinding *dicta* could be stated in the reverse: "because the majority opinion in ***Beine*** wholly disposed of the case by finding § 566.083.1(1) unconstitutional, the secondary analysis regarding the sufficiency of the evidence is non-binding *dicta*." The State chose to reverse the order, but it gives no reason to choose one of these propositions over the other. It was mere chance that the Court addressed sufficiency first; the constitutional issue was the first issue raised by Mr. Beine in his brief.

But on the merits of the State's claim, the Court of Appeals said it best:

> The State claims the constitutional discussion in ***Beine*** was *dictum* and not necessary because it followed the resolution of an evidentiary issue which disposed of the case. Simply because the constitutional issue was discussed "also" does not make it *dictum*. As a general rule, the Missouri Supreme Court will not address a constitutional question if the case can be "fully determined without reaching it." ***State v. Eisenhouer***, 40 S.W.3d 916, 919 (Mo. banc 2001). In other words, if the court addresses a constitutional question, that means the case could not be fully determined without reaching that question. Therefore, addressing the constitutional question was necessary to the ***Beine*** decision. Furthermore, the ***Beine*** court did not limit the constitutional discussion to the facts of the case or a hypothetical situation. The statement that Section 566.083.1(1) was "patently unconstitutional" was

neither *obiter dictum* nor an advisory opinion. Therefore, the constitutional discussion in ***Beine*** is binding precedent.

***State v. Burgin***, No. ED 86200 (May 16, 2006); Slip Opinion at 6-7.

The State simply pronounces that this Court's resolution of the constitutional question raised by Mr. Beine and fully litigated by both parties was "not an essential aspect of the opinion." (Resp.Br. 11). The State cites Judge White's (then Chief Justice White's) dissenting opinion in ***Brooks v. State***, 128 S.W.3d 844, 852 (Mo. banc 2004), for the proposition that "[S]tatements . . . are *obiter dicta* [if] they [are] not essential to the court's decision of the issue before it."

That may be a correct statement of the law, as far as it goes, but the point of the dissent in ***Brooks*** was whether the 2003 Concealed-Carry Act violated the "Hancock Amendment" (Mo. Const. Art. X, §§ 16 and 21) by imposing increased costs on local governments. *Id*. The dissent argued that the "*de minimis*" language in ***City of Jefferson v. Mo. Dept. of Natural Resources***, 916 S.W.2d 794 (Mo. banc 1996), [1] mentioned in the majority opinion, was *dicta*. ***Brooks***, 128 S.W.3d at 852. But the citation in ***Brooks*** to the "*de minimis*" language of ***City of Jefferson*** was itself

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[1] At issue in ***City of Jefferson*** was whether local governments in fact faced more than *de minimis* increased costs to meet the mandate of § 260.325.8 that they file a new solid waste plan with the State addressing various issues. 916 S.W.2d at 795. The Court said: "the second touchstone for a violation of Article X, § 21—increased cost—demands only greater than a *de minimis* increase[.]" *Id*.

arguably *dicta* because the majority and the dissent both agreed that the increased costs violated the Hancock Amendment as to the four counties as to which evidence was presented. ***Brooks***, 128 S.W.3d at 851-52. The dispute was as to the application of the Act to the remainder of the State and whether individual counties could voluntarily undertake the costs associated with processing permit applications. *Id*.

The State also cites ***Muench v. South Side Nat. Bank***, 251 S.W.2d 1, 6 (Mo. 1952) (Resp.Br. 12): "An *obiter dictum*, in the language of the law, is a gratuitous opinion[,]" quoting ***Hart v. Stribling***, 25 Fla. 433, 435, 6 So. 455 (1889). In ***Muench***, the Court discussed ***Hall v. Getman***, 121 Mo.App. 630, 97 S.W. 607 (K.C. 1906), a suit for damages for breach of contract. The ***Muench*** Court noted that:

> [i]n its discussion the Court of Appeals said that if plaintiff had sued the administrator in *quantum meruit* she could have recovered the reasonable value of her services, "her recovery being limited to the value of the property promised her in the contract." This was clearly *obiter dictum* as no such suit or question was before the court.

***Muench***, 251 S.W.2d at 6. There can be no doubt that the statement by the Court of Appeals in ***Hall*** was *dicta*, but the same does not apply to ***Beine***, because, unlike ***Hall***, the constitutional question was the <u>precise</u> issue before this Court in ***Beine***, fully litigated by Respondent herein.

The State claims that the entire discussion in ***Beine*** of the "patent" unconstitutionality of § 566.083.1(1), RSMo 2000, was "wholly extraneous" to the

actual holding of the Court." (Resp.Br. 13). But the discussion of the sufficiency issue in ***Beine*** begins on page 485 and concludes less than halfway through page 486—barely more than a single page in the reporter—while discussion of the constitutional question begins at that point and runs more than twice as long. Again it was only chance or the writer's decision as to the flow of the opinion that put the sufficiency issue first.

The order does not make the constitutional question "extraneous"—or *dicta*. Nor does the fact that this Court could have chosen not to resolve the primary question raised by the parties. Mr. Burgin's argument would not, as the State asserts, render virtually all *dicta* binding. (Resp.Br. 13). Mr. Burgin did not, and does not, argue that every time this Court makes a statement on any question it must be taken as the holding of the case. But there is a vast difference between the *dicta* in ***Hall***—or even the non-issue of the *de minimis* impact on costs to local governments in ***Brooks***—and this Court's extensive discussion and resolution of the precise constitutional question presented to it in ***Beine***. If the Court truly believed the constitutional issue was extraneous, it had the power—routinely exercised—to transfer the appeal to the Court of Appeals as not raising a substantial constitutional question.

The State also cites ***Swisher v. Swisher***, 124 S.W.3d 477, 482 (Mo.App. W.D. 2003), as an example of a Court declining—because it was *dicta*—to rely on a lengthy discussion of a "good faith" discussion in ***McDonald v. Burch***, 91 S.W.2d 660, 663-64 (Mo.App. W.D. 2002). But even in this example, the *dicta* is more subtle than the

State notes. In ***McDonald***, the issue was the mother's post-dissolution request to remove the children of the marriage to another state. The trial court denied her request both because it was not made in good faith and because it was not in the best interests of the children. *Id*., at 662. The Court of Appeals noted that the trial court's decision as to the best interests of the children was within its discretion, and affirmed on that basis, but not until it had first discussed the good-faith issue. *Id*., at 663.

As part of that discussion, the Court noted that the trial court had placed undue emphasis on the mother's purported dishonesty in testifying in the dissolution proceeding that she had no plans to relocate the children, then signing the next day a parenting plan that allowed such action. *Id*. The ***McDonald*** Court said:

> While past actions may certainly prove relevant to finding good faith or lack thereof in some circumstances, here, the court focused too heavily on Mother's past actions during the prior dissolution proceedings while seemingly disregarding her current reasons for requesting relocation. We cannot say from the record that Mother's current request to relocate was not made in good faith.

*Id*., at 663-64. Therefore, its discussion of good faith was in the context of <u>criticizing</u> the trial court for placing undue emphasis on the prior testimony during the dissolution. Yet it was that exact point raised by the appellant in ***Swisher***, leading the Court to call ***McDonald's*** good-faith discussion *dicta*: it held that the trial court committed error in doing the <u>same</u> thing the ***McDonald*** Court criticized—the trial court's reliance on evidence of misrepresentations in the dissolution proceeding to

find a lack of good faith and prevent the appellant from later relocating was error. ***Swisher***, 124 S.W.3d at 483.

Thus, the difference is that the *dicta* in ***McDonald*** that the ***Swisher*** Court declined to follow was not the criticism of the trial court's finding as to a lack of good faith, but simply ***McDonald's*** statement that the testimony from the dissolution proceeding could have some bearing on that issue. That, once more unlike ***Beine***, was unnecessary for the ***McDonald*** Court to address.

In a footnote the State cites the unpublished[2] decision of the Eastern District of the Court of Appeals in ***State v. Pleasant Hurst*** (Mem.), 84 S.W.3d 85 (Mo.App. E.D. 2005), in which this Court denied transfer in SC 87299. (Resp.Br. 14, n.3). But all the State has supplied is a copy of one page of the transfer application, without

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[2] Rule 30.25(b) states: "**Summary Orders.** In a case in which decision is unanimous and all judges believe that no jurisprudential purpose would be served by a written opinion, disposition may be made by a written summary order. By local court rule this Court or any district of the Court of Appeals may require a brief written statement be attached to any such order. The statement shall not constitute a formal opinion of the court and shall not be reported. Neither shall it be cited nor otherwise used in any case before any court."

Undersigned counsel must correct his statement in his opening brief (n.9, p. 21), that he did not have the name of the ***Hurst*** available to him. Respondent's counsel did state the name of the ***Hurst*** case during oral argument in the Court of Appeals.

suggestions or argument, or more importantly, without a copy of the Eastern District's memorandum in support of its order.[3] Because there is nothing shown in the available record or supplied by respondent, its request that this Court take judicial notice of the ***Hurst*** filings provides no basis to determine whether the Court of Appeals even considered ***Beine*** in reaching its decision. This Court should ignore ***Hurst***.

This Court should also ignore the State's speculation as to why the dissenting judges in ***Beine*** did not point out that the Court should not have reached the constitutional question. It would be inappropriate—surely not meant as such—to ascribe an ulterior motive (the easier circumvention of the majority decision at a later time) to the fact that the dissent did not claim that the majority was stating mere *dicta*. It is nonetheless a stretch as an explanation. The simpler explanation is that both majority and dissent, as did appellant and respondent, well understood that the primary issue in the case was the constitutional question that both parties fully litigated, and the Court decided, a mere sixteen months ago.

**B. Mr. Burgin need not raise a constitutional challenge to § 566.083.1(1)**

As noted, the State's argument that Mr. Burgin did not challenge the constitutionality of § 566.083.1(1), RSMo 2000, is correct, at least as far as it goes. But the State fails to note that the posture of this case is different. Mr. Burgin was convicted and sentenced scant days before this Court's decision in ***Beine*** was

[3] That assumes that there was a memorandum; there is no indication in the published memorandum that such a document was issued. 181 S.W.3d at 86.

announced, therefore in the Court of Appeals, at least, it was unnecessary to challenge the statute. The statute was officially defunct at that point, and there would have been no point in him raising that issue in his brief. The State is therefore correct that the general rule is that he has raised no preserved constitutional challenge to the statute.

But it is the State that has raised the question of the constitutionality of the statute, and it should not be heard to foreclose Mr. Burgin's argument that the Court in ***Beine*** was both correct and should be followed as a matter of *stare decisis*, simply because it was the party that first posed the question. That would put in peril any party who is convicted of violating a statute long after it is declared unconstitutional if he does not also challenge the statute, on the chance that the State may convince this Court that it was wrong in its earlier decision. Mr. Burgin challenged his conviction, and that should be all he was required to do. He admits that his challenge even as it is was raised as plain error;[4] any further curtailment of his ability to challenge his conviction is unwarranted.

**C. As this Court correctly declared in *Beine*, § 566.083.1(1), RSMo 2000, was patently unconstitutional.**

1. *The statute is overbroad.*

Although the language of the ***Beine*** opinion was not couched in terms of standing, an analysis shows that the Court first determined that Mr. Beine had

[4] A defendant cannot be legally convicted and incarcerated for violating a statute that is facially unconstitutional. ***State v. Mitchell***, 563 S.W.2d 18, 23 (Mo. banc 1978).

standing to challenge the statute as overbroad because his conduct—the use of a public restroom—was a fundamental, compelling interest. "Because a person's right to use public restrooms is about as fundamental a right as one can imagine, probably equal to or more fundamental than speech rights, the overbreadth doctrine should extend to this case and permit Mr. Beine to contest section 566.083.1(1) even if he had no right to engage in the conduct he engaged in." 162 S.W.3d at 487. The Court also noted that Missouri courts "have found the overbreadth doctrine applicable to non-first amendment cases in the past," citing ***City of St. Louis v. Burton***, 478 S.W.2d 320, 323 (Mo. 1972) (loitering ordinance struck down despite no First Amendment claims being made).

Once the Court determined that Mr. Beine had standing, it quickly decided that the statute was invalid: "When a statute prohibits conduct a person has no right to engage in and conduct a person has a right to engage in, the statute is unconstitutionally overbroad." Citing ***Burton*** and ***Christian v. Kansas City***, 710 S.W.2d 11, 12-14 (Mo.App. W.D. 1986). Because Mr. Burgin is not challenging the statute he does not have to show standing. But even if he did, he has standing for the same reason Mr. Beine did: because the statute impinged on a fundamental interest, "even if he had no right to engage in the conduct he engaged in." ***Beine***, 162 S.W.3d at 487.

2. *The statute is vague*.

This Court also determined that § 566.083.1(1) was vague because "It is a basic principle of due process that an enactment is void for vagueness if its

prohibitions are not clearly defined." ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972). The prohibition against vagueness ensures that laws give fair and adequate notice of proscribed conduct. ***State v. Mahan***, 971 S.W.2d 307, 312 (Mo. banc 1998). A valid statute provides a person of ordinary intelligence a reasonable opportunity to learn what is prohibited. ***State v. Mahurin***, 799 S.W.2d 840, 842 (Mo. banc 1990). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." ***Grayned***, 408 U.S. at 108-09; ***State ex rel. Cook v. Saynes***, 713 S.W.2d 258, 260 (Mo. banc 1986).

As this Court held in ***Beine***, § 566.083.1(1) left the accused "to guess what a hypothetical reasonable adult might believe as to the effect on the children witnessing the event." 162 S.W.3d at 488. The Court distinguished the statute, at least as it existed before its amendment post-***Beine***, from the third-degree sexual misconduct statute involved in ***State v. Moore***, 90 S.W.3d 64 (Mo. banc 2002) (§ 566.095: "a person commits the crime . . . if he solicits or requests another person to engage in sexual conduct under circumstances in which he knows that his requests [sic] or solicitation is likely to cause affront or alarm.").

At issue in ***Beine*** was whether the term "knowingly" modified the part of § 566.083.1(1) that stated "in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age," rather than just the "knowingly exposes" language. ***Beine***, 162 S.W.3d at 488. The Court said it did not and refused to rewrite the statute. *Id*. It added, "[t]he

[***Moore***] statute also specifically enumerates a knowing mens rea to the 'likely to cause affront or alarm' requirement. As such, the statute governing ***Moore*** contains the explicit language of scienter that section 586.083.1(1) lacks." *Id*. And without that "explicit language of scienter," § 566.083.1(1) as it was previously written was unconstitutionally vague.

**D. Conclusion**

***Hurst*** aside, the State has provided no reason why the issues it has raised here will apply to anyone other than Mr. Burgin, or why this Court should reexamine ***Beine*** less than a year and a half after it was decided. The legislature has amended the statute and it now tracks what this Court approved in ***Moore***, and the appropriate resolution of this case would be to retransfer this cause to the Court of Appeals so that its decision applying ***Beine*** may become final. Failing that, Mr. Burgin asks the Court to reaffirm its decision in ***Beine***, reverse his convictions, and remand with directions that he be discharged from his sentence.

## CONCLUSION

For the reasons set forth in Point I herein and in his opening brief, appellant John Burgin respectfully requests that this Court reverse his convictions and sentence and discharge him therefrom. In the alternative, for the reasons set forth in Point II in his opening brief, Mr. Burgin respectfully requests that the Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,630 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in September, 2006. According to that program, these disks are virus-free.

On the _____ day of September, 2006, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to Shaun J Mackelprang, Assistant Attorney General, 221 W. High Street, Jefferson City, MO 65102.

_____
Kent Denzel